No. 15811

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONTE G. MASON,

Appellant,

vs.

ERNEST UTLEY, Trustee in Bankruptcy of the Estate of Monte G. Mason, also known as M. G. Mason,

Appellee.

On Appeal From the District Court of the United States for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

Jurisdiction.

Appellee has no objection to the chronological statement of events, which are the basis for the jurisdiction of this court, as is set forth in the Appellant's Opening Brief, except that it should be noted that two petitions for review were filed. The second petition for review is designated as the "Supplemental Petition for Review," and was filed on July 23, 1957, to review the Order of Adjudication made on May 20, 1957.

Statutes Involved.

Appellee concedes that the statutes involved in this case are correctly stated in Appellee's Opening Brief except that a further statute involved is the interpretation of Title 11 U. S. C., Section 39c. The statute provides:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

Points on Appeal.

It is Appellee's contention that the only points on this appeal are as follows:

1. Where an individual testifies falsely in supplementary proceedings concerning the location, nature, and extent of his property does this false testimony constitute an act of bankruptcy?

2. Has the Referee in Bankruptcy or the District Judge abused his discretion in refusing to grant the motion to vacate the Order of Adjudication in these proceedings?

DISCUSSION.

I.

Is False Testimony in Supplemental Proceedings an Act of Bankruptcy?

The facts show that Monte G. Mason, the bankrupt herein, was examined in the Superior Court on Supplementary Proceedings pursuant to the provisions of Sections 714 and 715 of the Code of Civil Procedure.

The transcript (p. 11) contains the language of the amended petition in involuntary bankruptcy relating to the examination, the testimony, and the fact that said testimony was false and misleading.

It is appellee's contention that such testimony and such concealment constituted an act of bankruptcy under Section 3a(1) of the Bankruptcy Act quoted in Appellant's Opening Brief. Appellant's contention to the effect that the testimony was made in a State proceeding and not in the Bankruptcy Court appears to be without merit.

False testimony itself is sufficient to show a concealment.

In re Burg, 245 Fed. 173, 178 (N. D. Tex., 1917);

In re Glazier, 195 Fed. 1020 (M. D. Pa., 1912);

1 Collier, *Bankruptcy* Par. 3.103 (14th ed., 1940);

1 Remington, *Bankruptcy* 123 (5th ed. 1950);

Cf. Continental Bank and Trust Co. v. Winter, 153 F. 2d 397, 399 (2d Cir., 1946).

The word "concealed" as used in Section 3a(1) of the Bankruptcy Act is not limited in meaning to physical secretion.

See:

Coghlan v. United States, 147 F. 2d 233, 236-237 (8th Cir.), *cert. den.,* 325 U. S. 888, rehear. *den.,* 326 U. S. 805 (1945);

United States v. Zimmerman, 158 F. 2d 559 (7th Cir., 1946).

As noted previously, the supplemental petition to review the Order of Adjudication was not filed within the time limit set forth in Section 39 of the Bankruptcy Act.

In the case of *Pfister v. Northern Illinois Finance Corporation,* 317 U. S. 144, 87 L. Ed. 146, 63 S. Ct. 133 (1942); the limitation of Section 39c is a limitation on such filing as "a matter of right."

The authorities in this area have been collected by Judge Yankwich in the case of *In re Steinberg,* 138 Fed. Supp. 462 (1956). In this case Judge Yankwich likewise takes the view that it is discretionary with the court as to whether the review will be heard or not. The question left open is whether or not the petitioner must make some showing so as to cause the court to hear the belated petition. No such showing has been made in this case.

II.

Neither the Referee nor the District Judge Abused Their Discretion in Refusing to Set Aside the Order of Adjudication.

Counsel for the bankrupt made a motion under Rule 60 of the Federal Rules of Civil Procedure, to set aside the Order of Adjudication.

Rule 60(b) provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceedings for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . ."

The motion made was accompanied by an affidavit of Laurence Rittenband. [Tr. pp. 23-26.]

At the hearing the original letter sent by the undersigned to Mr. Rittenband was introduced by Mr. Rittenband as an exhibit. [Tr. pp. 25-26.]

The court, after hearing the argument of counsel, made an order denying the motion. [Tr. pp. 49-50.]

At the hearing on the motion, the position of Appellee was thoroughly discussed, *i.e.*, Appellee took the position then, as he does now that the affidavit of Laurence Rittenband set forth no facts whatsoever sufficient to justify the court's making an order setting aside the Order of Adjudication.

The court itself made a specific finding in its order to the effect that the affidavit was insufficient as a matter of law.

The court will note on page 48 of the Transcript that Appellee offered Mr. Rittenband the opportunity to file additional affidavits, which opportunity was not availed of by Mr. Rittenband.

Under General Order 47 of the Bankruptcy Act, the findings of a referee are accepted by the judge unless clearly erroneous.

Under Rule 60 of the Federal Rules of Civil Procedure, the court hearing the motion has discretion as to whether or not it should be granted. See Moore's Federal Practice, Volume 7, page 222, *et seq.*, cases collected in footnote 9.

See:

Jackson v. Heiser, 111 F. 2d 310 (1940).

Conclusion.

It follows that since the petition upon which the Order of Adjudication was made states a valid legal act of bankruptcy and that the court did not abuse its discretion in refusing to set aside said order, the judgment of the referee and of the district court should be affirmed.

Respectfully submitted,

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Attorney for Appellee.